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Hassnar Hj MP Ebrahim v Musah Ghani & Ors

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HIGH COURT (SANDAKAN) — SUIT NO SDK-22NCvC-15–7 OF 2016
CELESTINA STUEL GALID J
30 SEPTEMBER 2020

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Land Law — Ownership — Dispute — Plaintiff claimed legal and beneficial ownership — Whether there was valid sale and purchase agreement executed capable of specific performance — Whether claims of interference and conspiracy by plaintiff against first, second and third defendants were valid — Whether plaintiff's claims of abuse of power was valid — Whether there was negligence in granting the permission to transfer land by sixth to ninth defendants

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The subject matter of the present dispute concerned a piece of land described as Lot 14, Block 1, Phase 1, Luang Manis Smallholders Scheme in the District of Labuk and Sugut, Sandakan, Sabah measuring 14.87 acres under Native Title No 083022851 ('the land'). The land was part of a smallholder's scheme initiated sometime in 1977 by the state government for the grant of 15 acres of land each to the landless in Luang Manis. The land which was applied for by Hj Taib bin Abu Bakar ('Hj Taib') was issued with a title deed in Hj Taib's name on 7 March 2011. On 14 July 2014, the land was transferred from Hj Taib to one Masunah bt Marusin ('Masunah'). As at the date of the trial, Masunah was still the registered owner of the land. The plaintiff claimed to be the legal and beneficial owner of the land, having allegedly purchased it from Hj Taib when the land was still under a land application sometime in November 1988. The plaintiff further claimed that Hj Taib had entered into a sale and purchase agreement with him and also granted him a power of attorney over the land. Thereafter, he took possession of the land and fully cultivated it with oil palm. The plaintiff claimed that in July 2014, the first defendant assisted by four policemen from the Beluran police station ejected his labourers from the land and that he had lost about RM2,000 a month as profit from the sale of oil palm calculated from the day he surrendered possession of the land on 14 July 2014. The plaintiff further claimed that the transfer of the land from Hj Taib to Masunah was illegal through the first and second defendants' dishonesty, deception and trickery as well as conspiracy and collusion with the sixth to ninth defendants to inflict injury with common intention to deprive the plaintiff of the land and therefore caused the plaintiff to suffer damages. Hj Taib and Masunah passed away on 12 June 2011 and 10 March 2016 respectively and were sued in this action through their personal representatives as the fourth and third defendants respectively. The plaintiff had obtained ajudgment in default of defence dated 3 May 2017 against the estate of Hj Taib

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and the fifth defendant in respect of prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v) and costs in encl 56; and also a judgment in default of appearance dated 26 January 2018 against the estate of Masunah (the third defendant herein) in respect of prayers 39.1(a) and (c) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) in encl 91. It was contended by learned counsel for the plaintiff that the effect of the judgments in default was that the court was bound to only consider the reliefs under prayers 39.1(c), (d), (e), (f), (g), (h), (i) and (j) and 39.2 (i), (iii), (v), (vi), (vii) and (viii) in the trial of the action. The court directed the parties to address the court on the issue as to the effect of the judgments in default obtained by the plaintiff against the third, fourth and fifth defendants on the plaintiff's action against the rest of the defendants. For the plaintiff, it was contended that as the judgments in default had not been set aside, the court's hands were tied. It was further contended that the plaintiff's claim against the remaining defendants were severable, distinguishable and separate from that of the third, fourth and fifth defendants so that the plaintiff was entitled to proceed with his claim against them notwithstanding the judgments in default. The other issues for the determination by the court were: (a) whether there was a valid sale and purchase agreement executed between Hj Taib and the plaintiff and his wife capable of specific performance; (b) whether the claims of interference and conspiracy by the plaintiff against the first, second and third defendants were valid; (c) whether the plaintiff's claims of abuse of power and negligence in granting the permission to transfer the land against the sixth to ninth defendants were valid; and (d) whether the judgments in default against the third, fourth and fifth defendants could be sustained.

Held, dismissing plaintiff's claim with costs:

(1) The default judgments could only estop what has been necessarily and with complete precision been decided. It could not be said that the plaintiff's claim against the remaining defendants was severable from the claim against the third, fourth and fifth defendants. The issues identified by the plaintiff himself where the primary or first issue to be determined was whether there was a valid sale and purchase agreement between the plaintiff and Hj Taib that was capable of specific performance. That the issue formed the basis for the plaintiff to claim against the other defendants was further evident in that the other issues identified by the plaintiff were all premised on an affirmative finding on the first issue in favour of the plaintiff. The court was therefore not precluded from considering the full merits of the plaintiff's claim including on prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) notwithstanding the judgments in default (see paras 22–23 & 26).

(2) It was an express term in the letter of offer issued to Hj Taib that the land was prohibited from being transferred to another without the permission from the director of Lands and Surveys Department. A similar term was found on the title deed to the land. It was not in dispute that there was no

permission obtained by Hj Taib to transfer the land to the plaintiff. The prayer for declaration for the alleged agreement between the plaintiff and Hj Taib to be specifically performed was bound to come to naught as it necessarily amounted to compelling the director to exercise his discretion under s 9(1) of the Land Ordinance (Sabah) (Cap 68) in favour of the plaintiff. The prayer clearly went against s 44 of the Specific Relief Act 1950. The plaintiff had failed to establish that there was a sale and purchase agreement between him and Hj Taib. Even if there was such an agreement, it would not have been capable of specific performance as it would go against the director's discretion under s 9 of the Land Ordinance (Sabah) (Cap 68) (see paras 51, 53 & 56–57).

(3) The grant of prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v) and costs against the fourth and fifth defendants and of prayers 39.1(a) and (c) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) against the third defendants under the judgments in default was clearly inconsistent with this court's dismissal of the whole of the plaintiff's claim. The reliefs under the judgments in default against the third, fourth and fifth were declaratory in nature and were therefore liable to be set aside. Given the court's finding on the plaintiff's claim on its merits, it followed that the judgments in default were no longer sustainable (see paras 96 & 99).

[Bahasa Malaysia summary

Perkara pertikaian di dalam prosiding ini adalah berkenaan sebidang tanah yang dikenali sebagai Lot 14, Blok 1, Fasa 1, Skim Pekebun Kecil Luang Manis di Daerah Labuk dan Sugut, Sandakan, Sabah seluas 14.87 ekar di bawah Hak MilikAn Bumiputera No 083022851 ('tanah'). Tanah tersebut adalah sebahagian daripada skim pekebun kecil pada tahun 1977 oleh kerajaan negeri untuk pemberian 15 ekar tanah setiap satu kepada mereka yang tidak mempunyai tanah di Luang Manis. Tanah yang dipohon oleh Hj Taib bin Abu Bakar ('Hj Taib') telah dikeluarkan surat ikatan hakmilik Hj Taib pada 7 Mac 2011. Pada 14 Julai 2014, tanah tersebut telah dipindahkan daripada Hj Taib kepada Masunah bt Marusin ('Masunah'). Setakat tarikh perbicaraan, Masunah masih merupakan pemilik berdaftar tanah tersebut. Plaintif mendakwa sebagai pemilik tanah yang sah dan bermanfaat, setelah didakwa membelinya daripada Hj Taib ketika tanah itu masih dalam permohonan tanah pada november 1988. Plaintif juga mendakwa bahawa Hj Taib telah memeterai perjanjian jual beli dengannya dan juga memberikan kuasa wakil ke atas tanah tersebut. Selepas itu, beliau mengambil alih tanah tersebut dan menanam kelapa sawit. Plaintif mendakwa bahawa pada Julai 2014, defendan pertama dibantu oleh empat anggota polis dari balai polis Beluran yang membantu membangunkan tanah tersebut dan bahawa dia telah kerugian kira-kira RM2,000 sebulan sebagai keuntungan daripada penjualan kelapa sawit yang dikira dari hari dia menyerahkan pemilikan tanah tersebut pada 14 Julai 2014. Plaintif juga mendakwa bahawa pemindahan tanah dari Hj Taib ke

Masunah adalah menyalahi undang-undang melalui frod, penipuan dan tipu helah defendan pertama dan kedua serta konspirasi dan pakatan antara defendan keenam hingga kesembilan untuk menyebabkan kerugian dan melucutkan plaintif tanah tersebut. Oleh itu, menyebabkan plaintif mengalami kerosakan. Hj Taib dan Masunah masing-masing meninggal dunia pada 12 Jun 2011 dan 10 Mac 2016 dan masing-masing disaman di dalam tindakan ini melalui wakil peribadi masing-masing sebagai defendan keempat dan ketiga. Plaintif telah penghakiman ingkar pembelaan bertarikh 3 Mei 2017 terhadap harta pusaka Hj Taib dan defendan kelima berkenaan dengan tuntutan 39.1(a), (c) dan (i) dan 39.2(i), (ii), (iii), (iv), (v) dan kos dalam lampiran 56; dan juga penghakiman ingkar kehadiran bertarikh 26 Januari 2018 terhadap harta pusaka Masunah (defendan ketiga di dalam ini) berkenaan dengan tuntutan perenggan 39.1(a) dan (c) dan 39.2(i), (ii), (iii), (iv), (v), (vi) dan (vii) dalam lampiran 91. Peguam bela plaintif menghujahkan bahawa kesan penghakiman ingkar adalah mahkamah terikat untuk hanya mempertimbangkan relif di bawah tuntutan perenggan 39.1(c), (d), (e), (f), (g), (h), (i) dan (j) dan 39.2 (i), (iii), (v), (vi), (vii) dan (viii) dalam perbicaraan tindakan itu. Mahkamah mengarahkan pihak-pihak terbabit untuk mengemukakan hujahan di mahkamah berhubung isu tersebut mengenai kesan penghakiman ingkar yang diperoleh oleh plaintif terhadap defendan ketiga, keempat dan kelima atas tindakan plaintif terhadap defendan-defendan lain. Plaintif menghujahkan bahawa kerana penghakiman ingkar tidak diketepikan, mahkamah terikat kepada penghakiman ingkar tersebut. Tuntutan plaintif terhadap defendan-defendan yang selebihnya boleh dibezakan dan berasingan daripada defendan ketiga, keempat dan kelima supaya plaintif berhak meneruskan tuntutannya terhadap mereka tanpa mengambil kira penghakiman ingkar tersebut. Isu-isu lain untuk penentuan mahkamah ini adalah: (a) sama ada terdapat perjanjian jual beli yang sah di antara Hj Taib dengan plaintif dan isterinya membolehkan perlaksanaan spesifik; (b) sama ada tuntutan campur tangan dan konspirasi oleh plaintif terhadap defendan pertama, kedua dan ketiga adalah sah; (c) sama ada tuntutan plaintif mengenai penyalahgunaan kuasa dan kecuaian dalam memberikan kebenaran untuk memindahkan tanah itu terhadap defendan keenam hingga kesembilan adalah sah; dan (d) sama ada penghakiman ingkar terhadap defendan ketiga, keempat dan kelima boleh dikekalkan.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Penghakiman ingkar hanya boleh mengestop perkara yang jelas. Adalah tidak pasti bahawa tuntutan plaintif terhadap defendan-defendan yang lain adalah dihalang daripada tuntutan terhadap defendan ketiga, keempat dan kelima. Isu-isu yang dikenal pasti oleh plaintif sendiri di mana isu utama atau pertama yang akan ditentukan adalah sama ada terdapat perjanjian jual beli yang sah antara plaintif dan Hj Taib membolehkan perlaksanaan spesifik. Isu ini menjadi asas bagi plaintif

untuk membuat tuntutan terhadap defendan-defendan lain. Isu-isu lain yang dikenal pasti oleh plaintif semuanya adalah berdasarkan dapatan isu pertama yang memihak kepada plaintif. Oleh itu, mahkamah ini tidak terkecuali dari mempertimbangkan merit penuh tuntutan plaintif termasuk pada tuntutan perenggan 39.1(a), (c) dan (i) dan 39.2(i), (ii), (iii), (iv), (v), (vi) dan (vii) walaupun terdapat penghakiman ingkar (lihat perenggan 22–23 & 26).

(2) Adalah jelas di dalam surat tawaran yang dikeluarkan kepada Hj Taib bahawa tanah tersebut dihalang dari dipindahkan kepada yang lain tanpa kebenaran daripada pengarah Jabatan Tanah dan Ukur. Terma yang sama terdapat di dalam surat ikatan hak milik tanah tersebut. Tidak dipertikaikan bahawa tiada kebenaran yang diperolehi oleh Hj Taib untuk memindahkan tanah tersebut kepada plaintif. Permohonan perisytiharan bagi perjanjian yang didakwa antara plaintif dan Hj Taib yang akan dilakukan secara khusus adalah terikat untuk dilaksanakan kerana ianya bermaksud memastikan pengarah untuk menggunakan budi bicaranya di bawah s 9(1) Ordinan Tanah (Sabah) (Cap 68) yang memihak kepada plaintif. Tuntutan tersebut jelas bertentangan dengan s 44 Akta Spesifik Relif 1950. Plaintif telah gagal membuktikan bahawa terdapat perjanjian jual beli antara dia dan Hj Taib. Walaupun terdapat perjanjian sedemikian, ianya akan bertentangan dengan budi bicara pengarah di bawah s 9 Ordinan Tanah (Sabah) (Cap 68) (lihat perenggan 51, 53 & 56–57).

(3) Perintah untuk tuntutan perenggan 39.1(a), (c) dan (i) dan 39.2(i), (ii), (iii), (iv), (v) dan kos terhadap defendan keempat dan kelima dan tuntutan perenggan 39.1(a) dan (c) dan 39.2(i), (ii), (iii), (iv), (v), (vi) dan (vii) terhadap defendan ketiga di bawah penghakiman yang ingkar adalah tidak konsisten dengan pembatalan keseluruhan tuntutan plaintif oleh mahkamah. Relif di bawah penghakiman ingkar terhadap defendan ketiga, keempat dan kelima adalah deklarasi pengisytiharan dan ianya harus diketepikan. Memandangkan keputusan mahkamah mengenai tuntutan plaintif berdasarkan merit, penghakiman ingkar tidak lagi boleh dipertahankan (lihat perenggan 96 & 99).]

Cases referred to

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2011] 5 MLJ 512; [2011] 7 CLJ 121, FC (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Letchumanan Chettiar Alagappan (as executor to SL Alameloo Achi) (deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697; [2017] 5 CLJ 418, FC (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105; [1984] 2 CLJ 88; [1984] 1 CLJ Rep 211, FC (folld)

Malayan Banking Bhd v Neway Development Sdn Bhd & Ors [2017] 5 MLJ

180; [2017] 9 CLJ 401, FC (refd)
Mvaami (Pty) Ltd v Standard Finance Ltd [1977] (1) SA 861 (R) (refd)
New Brunswick Railway Cpn v British & French Trust Corporation Ltd [1938] 4 All ER 765, HL (refd)
Norsitah Ottoh v Nasry Yahya & Ors [2010] MLJU 2207, HC (refd)
Renault SA v Inokom Corporation Sdn Bhd & Anor and other applications [2010] 5 MLJ 394; [2010] 5 CLJ 32, CA (refd)
SA Andavan v Registrar Of Titles, Negeri Sembilan & Ors [1977] 2 MLJ 220; [1975] 1 LNS 155 (refd)
Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah [1994] MLJU 398; [1994] 3 CLJ 229, HC (refd)
Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v Zakaria Hussin [1985] 2 MLJ 287; [1985] 1 LNS 38, SC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, HC (refd)
The State Government Of Sabah & Ors v Clarence Chiuh Ken Loong & Ors [2017] 3 MLJ 127; [2017] 2 CLJ 379, CA (refd)
Workon Sdn Bhd v The Director of Lands and Surveys, Sabah & Ors [1999] 4 MLJ 177; [1999] 1 LNS 40, HC (refd)
Yap JH v Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ Rep 243, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102
Land Ordinance (Cap 68) ss 9, 9(1), 17, 17(1), (5)
Rules of Court 2012 O 13 r 6
Specific Relief Act 1950 s 44

Ansari Abdullah (Ansari & Co) for the plaintiff.
Hamida Ambo (Ambo & Co) for the first and second defendants.
Mohammad Abdul Sani (Mohammad Ikhwan Ramlan with him) (Sarawak Senior State Counsel) for the sixth, seventh, eighth and ninth defendants.

Celestina Stuel Galid J:

INTRODUCTION

The subject matter of the dispute

[1] The subject matter of the present dispute concerned a piece of land described as Lot 14, Block 1, Phase 1, Luang Manis Smallholders Scheme in the District of Labuk and Sugut, Sandakan, Sabah measuring 14.87 acres under Native Title No 083022851 ('the land').

[2] The land is part of a smallholders scheme initiated sometime in 1977 by the State Government for the grant of 15 acres of land each to the landless in Luang Manis.

[3] The land which was applied for by Hj Taib bin Abu Bakar ('Hj Taib') was issued with a title deed in Hj Taib's name on 7 March 2011. On 14 July 2014, the land was transferred from Hj Taib to one Masunah bte Marusin ('Masunah'). As at the date of the trial, Masunah was still the registered owner of the land.

THE PLAINTIFF'S CLAIM

[4] The plaintiff claimed to be the legal and beneficial owner of the land, having allegedly purchased it from Hj Taib when the land was still under a land application sometime in November 1988. The plaintiff further claimed that Hj Taib had entered into a sale and purchase agreement with him and also granted him a power of attorney over the land. Thereafter, he took possession of the land and fully cultivated it with oil palm.

[5] The plaintiff claimed that in July 2014, the first defendant assisted by four policemen from the Beluran Police Station ejected his labourers from the land and that he had lost about RM2,000 a month as profit from the sale of oil palm calculated from the day he surrendered possession of the land on 14 July 2014.

[6] The plaintiff further claimed that the transfer of the land from Hj Taib to Masunah was illegal through the first and second defendants' dishonesty, deception and trickery as well as conspiracy and collusion with the sixth to ninth defendants to inflict injury with common intention to deprive the plaintiff of the land and therefore caused the plaintiff to suffer damages.

[7] Hj Taib and Masunah passed away on 12 June 2011 and 10 March 2016 respectively and were sued in this action through their personal representatives as the fourth and third defendants respectively.

Judgments in default dated 3 May 2017 and 26 January 2018

[8] At the outset, it is to be noted that the plaintiff had obtained the following judgments in default:

(a) judgment in default of defence dated 3 May 2017 against the estate of Hj Taib (the fourth defendant herein) and the fifth defendant in respect of prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v) and costs (encl 56); and

(b) judgment in default of appearance dated 26 January 2018 against the estate of Masunah (the third defendant herein) in respect of prayers 39.1(a) and (c) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) (encl 91).

[9] For reasons best known to the personal representatives of the estates of Hj Taib and Masunah, no attempt was made to have the judgments in default set aside and therefore, the judgments remained until the conclusion of the trial in respect of the remaining defendants. As for the fifth defendant, he testified in court that he was aware of the judgment in default against him but when asked if he had made any application to have it set aside, he merely stated 'Ada sama bini saya' (see Q/A305, notes of proceedings ('NOP')).

[10] It was contended by learned counsel for the plaintiff that the effect of the judgments in default was that the court was bound to only consider the reliefs under prayers 39.1(c), (d), (e), (f), (g), (h), (i) and (j) and 39.2(i), (iii), (v), (vi), (vii) and (viii) in the trial of this action.

[11] It will therefore be useful to reproduce the prayers sought for by the plaintiff.

[12] The plaintiff had prayed for as follows (verbatim).

39.1 a declaration:

a. there was a contract enforceable in law and capable of specific performance made between the Plaintiff and the deceased person (Hj Taib);

b. the plaintiff is the legal and beneficial owner of the said land;

c. that any sale and purchase or sublease agreement entered into between the deceased person and the first, second and the deceased third defendants and or any of their nominees, if any is against the doctrine of unjust enrichment, the Contracts Act 1950 and has no legal effect, null and void, unenforceable and rescinded;

d. that all agreement entered into and or all document executed by the deceased person to apply for permission to transfer, execution of the memorandum of Transfer of the said land was obtained on the basis of deception and fraudulent misrepresentation by the 1st and 2nd Defendants and has no legal effect, null and void and cancelled;

e. that the permission to transfer the said land to the 3rd Defendant (Masunah) by the 6th and 7th Defendants while assuming the post of the 9th Defendant was laced with malice and ulterior motives;

f. that the written permission from the 9th Defendant to transfer the said land *vide* letter bearing reference L.S.822.1.1447/16 (RK/lin) dated 12.10.2011 favouring the 3rd Defendant was product of an evil plot

executed on the basis of misrepresentation, fraud, cheat, lies and is null and void and cancelled; A

g. that the transfer of the said land subsequent to the approval granted by the 9th Defendant is null and void and cancelled;

h. that the clause in the title deed restricting the transfer of legal interest in the said land unless written consent of the Director of Land and Surveys is first obtained had been abused rampantly as a weapon of oppression by the 6th and 7th Defendants against the Plaintiff; B

i. that the 2nd Defendant is the actual purchaser and owner of the said land while the 1st and 3rd Defendant was his appointed nominee to circumvent section 17 and section 64 of the Sabah Land Ordinance Cap. 68; C

j. that the 4th and 5th Defendant, in complicit with the 1st to the 3rd and the 6th and 7th Defendants be collectively held responsible for their collusion and involvement to cheat and deprive the Plaintiff of his legal and beneficial ownership over the said land; D

39.2 an order:

i. of injunction to restrain the 1st to the 3rd Defendant, their agent and or servant from entering and re-entering the said land and to restrain the Defendants, their servants and/or agents from preventing the Plaintiff, his servant and/or agents from taking possession and or working on the said land; E

ii. that the transfer of the said land from the deceased person to the 3rd Defendant be revoked and set aside; F

iii. that the 1st, 2nd, and or personal representative of the 3rd Defendants and or their agents and servants there under do return the issued document of title to the said land to the Plaintiff and or the Plaintiff's solicitors within seven (7) days from the making of this order to enable the Plaintiff and or the Plaintiff's Solicitors to do all the necessary to cancel the transfer; G

iv. that the 8th Defendant do expunge from the register all record and memorial of transfer and return the title deed of the said land to the Plaintiff and or the Plaintiff's Solicitor once the same is handed to the 8th Defendant for execution of the Order as pleaded under sub paragraph (ii) and (iii) above; H

v. that damages to be assessed for the trespass by the 1st to the 3rd Defendants, their agents and/servants for the loss of use of the said land to be paid by the defendants to the Plaintiff together with interest at 4% per annum as from the dates of making this order until full payment under section 11 of the Civil Law Act 1956; I

vi. that the 1st to the 9th Defendants and or the deceased person's estate pay the cost of the action herein together with interest at 5% per annum as from the date of Judgment until full payment under Section

A 11 of the Civil Law Act 1956;

vii. alternatively, statutory interest at 5% per annum in respect of prayer 47.2.4 from the day of the Writ until full payment; and

viii. any other orders as the Honourable deem fit to grant.

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[13] This court had, at the conclusion of the trial, directed the parties to address the court on the issue as to the effect of the judgments in default obtained by the plaintiff against the third, fourth and fifth defendants on the plaintiff's action against the rest of the defendants.

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[14] For the plaintiff, it was contended that as the judgments in default had not been set aside, the court's hands were tied. Learned counsel for the plaintiff also drew this court's attention to the evidence by the eighth defendant (DW9) that due to the judgment in default against Masunah, the transfer of the land to her was ordered to be cancelled and that the land had reverted back to Hj Taib (see Q/A 11, DWS-9).

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[15] Relying on the case of *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v Zakaria Hussin* [1985] 2 MLJ 287; [1985] 1 LNS 38 and O 13 r 6 of the Rules of Court 2012, it was further contended that the plaintiff's claim against the remaining defendants were severable, distinguishable and separate from that of the third, fourth and fifth defendants so that the plaintiff was entitled to proceed with his claim against them notwithstanding the judgments in default.

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[16] Learned counsel for the first and second defendants on the other hand submitted that the plaintiff's claim against the remaining defendants was not separate nor distinct from that as against the third, fourth and/or fifth defendants as evidenced by prayers 39.1(c), (i), (j) and 39.2(i), (iii) and (v) of the plaintiff's amended statement of claim. Thus, it was further submitted that notwithstanding the judgments in default, the plaintiff still had to lead evidence to challenge the transfer of the land by Hj Taib to Masunah. In addition, it was contended that as the plaintiff's claims against all the defendants were premised on the tort of conspiracy, the plaintiff was not entitled to rely on the judgments in default alone to prove his case.

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[17] In dealing with this issue, I had first considered that the purported reliefs obtained by the plaintiff under the judgments in default were declaratory in nature — see para [12] above.

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[18] The correctness of such judgment in default was considered by the Federal Court in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2011] 5 MLJ 512; [2011] 7 CLJ 121 when it dealt with the following leave question:

Whether an application for a declaratory judgment in default of defence pursuant to O 19 r 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for?

[19] In that case, the respondent had obtained a judgment in default of defence for, inter alia, a declaration that the supplementary agreement entered between the respondent, the first defendant and the appellant has been validly cancelled and terminated by the respondent. The High Court dismissed the appellant's application for extension of time to file its defence and application to set aside the judgment in default. The Court of Appeal upheld the High Court's decision.

[20] The Federal Court allowed the appeal, inter alia, holding as follows:

(1) In the present case there was no dispute that the main relief in the impugned judgment was the declaration that the supplementary agreement entered into between the respondent, Gymtech and the appellant had been validly cancelled and terminated by the respondent. It was also clear that the impugned judgment was in fact a judgment in default of defence. As declaration was the main prayer of the respondent it is a rule of practice that before such relief is granted there must be some evidential basis to do so. However, there was nothing to indicate that discretion was exercised by the court when granting the declaratory relief as found in the impugned statement. Hence it was found that the impugned judgment being declaratory in substance had not met the entrenched rule of practice applicable for the granting of declaratory relief and on this ground alone the appeal should be allowed.

[21] Likewise in the present case, the judgments in default against the third, fourth and fifth defendants included declaratory reliefs under prayers 39.1(a), (c) and/or (i). However, unlike *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd*, as noted earlier, there was no application by the third, fourth and/ or fifth defendants to have the judgments in default set aside in the present case.

[22] Learned counsel for the plaintiff had submitted that this court's hands were therefore tied. I did not find this submission to be persuasive. For one, it must be remembered that default judgments can only estop what has been necessarily and with complete precision been decided — see the case of *Mvaami (Pty) Ltd v Standard Finance Ltd* [1977] (1) SA 861 (R) citing the case of *New Brunswick Railway Cpn v British & French Trust Corporation Ltd* [1938] (4) All ER 765 wherein it was held that:

Default judgments, though capable of giving rise to estoppels, must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they can estop only for what must necessarily and with complete precision have been thereby determined.

[23] For another, reading the amended statement of claim as a whole, it cannot be said that the plaintiff's claim against the remaining defendants herein was severable from the claim against the third, fourth and/or fifth defendants. This was in fact evident from the issues identified by the plaintiff himself in this action — see encls 191 and 194 where the primary or first issue to be determined was whether there was a valid sale and purchase agreement between the plaintiff and Hj Taib that was capable of specific performance. That the issue formed the basis for the plaintiff to claim against the other defendants was further evident in that the other issues identified by the plaintiff were all premised on an affirmative finding on the first issue in favour of the plaintiff.

[24] For completeness, the plaintiff's issues to be tried are reproduced below:

Issue 1:

Whether there was a valid Sale and Purchase agreement executed between the 1st deceased person (Hj. Taib) and the Plaintiff and his wife capable of specific performance;

Issue 2:

If the answer to Issue 1 is in the affirmative, the issue between the Plaintiff and the 1st and 2nd Defendant is:

Whether the 1st and 2nd Defendants dishonestly, through deception and trickery enticed the 1st deceased person to breach his agreement with the plaintiff and sell the said land to 3rd Parties;

Issue 3:

If the answer to Issue 2 is in the affirmative, the next issue between the 1st and 2nd Defendant are:

Issue 3a:

Whether the 1st and 2nd Defendants conspired and or did conspired (sic) to injure and liable for causing the Plaintiff to suffer loss and damages;

Issue 3b:

Whether the 1st and 2nd Defendants used the name of Masunah Bte Marusin to circumvent section 17 and section 64 of the Sabah Land Ordinance 68;

Issue 4:

If the answer to Issue 1 to 3 is in the affirmative, the issue between the Plaintiff and the 6th to 9th Defendant are:

Issue 4a:

Whether the 6th and 7th Defendants abused their administrative power and used the special terms in the Letter of Offer issued to the 1st deceased person (Hj. Taib) to own the Said Lands to discriminate against the Plaintiff; and

Issue 4b:

Whether the 6th, 7th, 8 th and 9th Defendants colluded with the 1st and 2nd Defendants in the conspiracy to inflict injury with common intention to cause the Plaintiff to suffer loss and damages. (Emphasis added.)

[25] The plaintiff also sought for the determination of the following additional issues:

Issue 5:

Whether the 7th and 8th Defendants had been negligent in processing and/ or approving the permission to transfer the Land from the 3rd to the 4th Defendant after the death of the 3rd Defendant;

Issue 6:

Whether the 7th and 8th Defendants were negligent in processing and/ or approving the permission to transfer and sublease from the 4th Defendant to the 2nd Defendant after the death of the 4th Defendant.

[26] The court was therefore not precluded from considering the full merits of the plaintiff's claim including on prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) notwithstanding the judgments in default.

THIS COURT'S DECISION

Issue 1 — Whether there was a valid sale and purchase agreement executed between Hj Taib and the plaintiff and his wife capable of specific performance

[27] It would be appropriate to first reiterate what is the trite law ie, that the legal burden of establishing the facts pleaded against the defendant is on the plaintiff (see ss 101 and 102 of the Evidence Act 1950).

[28] In *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, it was held that:

It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party ... What shifts is the responsibility of adducing evidence to discharge that burden ... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. *If the party whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail to him to turn around and say that the respondent has not established his.* (Emphasis added.)

[29] Of more recent, the Federal Court in *Letchumanan Chettiar Alagappan (as executor to SL Alameloo Achi) (deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697; [2017] 5 CLJ 418 had the occasion to deal with the issue as to who had the burden to prove the allegation of forgery.

[30] In that case, a power of attorney made in favour of one Kalidas a/l Komarawelo was used to execute a sale and purchase agreement of the subject land to the respondent. The first appellant claimed that his signature on the power of attorney had been forged and that therefore the power of attorney was invalid.

[31] Both the High Court and the Court of Appeal held that the respondent was a bona fide purchaser and that the appellants had not discharged the burden of proving that the power of attorney had been forged as the appellants failed to call a handwriting expert witness to prove the allegation of forgery.

[32] The Federal Court allowed the appeal and, inter alia, held as follows:

> The Court of Appeal was also wrong to hold that once proved that the respondent was a bona fide purchaser, the burden was upon the appellants to prove forgery. Proof of bona fide purchaser could not make out a prima facie case to shift the onus of proof to the appellants. In the present case it would pan out that the respondent, who was the plaintiff, had both the 'burden of proof to make out a prima facie as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the appellants if the respondent had made out a prima facie case. That remained so even though forgery was pleaded ... There is no law which says that a claim automatically succeeds if the defence fails. A claim succeeds only if a prima facie claim is made out or the cause of action is admitted and there is no defence. Both courts below overlooked s 101 of the Evidence Act 1950, which was the overarching provision before ss 102 and or 103 would enter into the equation. The burden of proof to establish the claim was not discharged.

[33] In his amended statement of claim, the plaintiff pleaded that Hj Taib was issued with a letter of offer for the land in November 1981 by the ninth defendant. In November 1988, Hj Taib entered into an agreement to sell the land to the plaintiff and that at the same time, granted him a power of attorney over the land. Hj Taib also handed over the original copy of the indorsed letter of offer and bequeathed the land to the plaintiff's family.

[34] The plaintiff testified in the trial as PW5. In his witness statement (PWS-5), the plaintiff stated that he had bought the land together with several other parcels of land measuring more than one hundred acres, all in the vicinity of Block 1, Phase 1 of Luang Manis Small Holders Scheme.

[35] The plaintiff further said he had prepared two sale and purchase agreements, two powers of attorney each executed between himself and Hj Taib and between Hj Taib and his wife, PW8. Thereafter, the plaintiff took possession of the land.

[36] The plaintiff did not, however, produce the alleged sale and purchase agreement and power of attorney between Hj Taib and himself during the trial. In Q/A11 of PWS-5, the plaintiff was asked to explain the reason why this was so, to which the plaintiff gave a long (unrelated) answer but eventually stated as follows:

> ... if I were to produce all these documents my bundle would be voluminous. Secondly, from my previous legal action most of the Defendants were already in the know the legality of my purchase of all the lands within the Small Holders Scheme ...

[37] In his oral examination-in-chief, however, the plaintiff contradicted himself by giving a different justification for the non-production of the documents, stating as follows (see line 20, p 55 NOP and lines 1 to 3, p 66 NOP):

> I did not include in my bundle of documents a copy of my Sales and Purchase Agreement and the power of attorney because my office had been burgled break (sic) 585 into 3 times ...

[38] In her witness statement, PW8 asserted (Q/A 16, PWS-8) that the plaintiff was a joint purchaser of the land, however, the power of attorney and sale and purchase agreement produced in court both dated 15 November 1988 were between Hj Taib and PW8 only. The plaintiff was not mentioned in the agreement as a joint purchaser or at all.

[39] When asked to explain why the power of attorney and sale and purchase agreement produced in court both dated 15 November 1988 between Hj Taib and PW8 did not include him, the plaintiff stated that he had a 'similar agreement' and also that Hj Taib had bequeathed the land to his son.

[40] PW8 was never added as a co-plaintiff in the present action despite allegedly being a co-purchaser of the land. Neither was the plaintiff's son whom Hj Taib had allegedly bequeathed the land to. In fact, there was no averment to this effect in the amended statement of claim.

[41] Thus, when learned counsel for the plaintiff submitted that the Deputy Director of Lands and Surveys Department (PW1) agreed that the power of attorney dated 15 November 1988 granted by Hj Taib to PW8 was sufficient to

A enable the party to deal with the said department, it did not assist the plaintiff's case at all as the present action had nothing to do with the alleged agreements made by Hj Taib with PW8.

B **[42]** Without the documentary evidence supporting the plaintiff's claim on his alleged purchase of the land, much reliance was made on the oral evidence of the plaintiff's witnesses, including PW7 who was the son-in-law of Hj Taib and the fifth defendant in this action. PW7 was also the husband of the fourth defendant.

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[43] PW7 testified that to his recollection, the plaintiff had managed the land since in 1981 or 1982 and that it was the plaintiff who had given the letter of offer to Hj Taib. PW7 also stated that the plaintiff had indeed purchased the land from Hj Taib. However, he did not elaborate as to his basis for asserting as
D such.

[44] PW7 was subpoenaed by the plaintiff to testify on his behalf. Although his examination-in-chief was by way of a witness statement (PWS-7), it was in the English language but without it having the necessary jurat that the contents
E had been read and translated to him. The witness statement was only read and translated to PW7 in court by the court interpreter.

[45] When asked in cross-examination as to who had prepared his English witness statement, PW7 stated the following (see Q/A 297, NOP):

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> Saya tidak pernah buat statement dalam Bahasa English.

[46] It was therefore not inconceivable that PW7 only knew of the contents of his purported witness statement when it was first read and translated to him
G in court.

[47] There was another reason for treating PW7's evidence with caution. PW7 was 72 years old at the time of his testimony. I observed him to be a simple elderly man who at times appeared to be overwhelmed by the court
H proceedings. However, the person PW7 in court was radically in contrast with the person who purportedly testified through his witness statement.

[48] For instance, to the question of whether he knew why he was testifying in the proceedings, PW7 gave the following somewhat legalistic answer (see
I Q/A 1, PWS-7):

> The Plaintiff had named my wife and I as Defendants under this suit however, we decided not to contest this suit because we both know as a matter of fact, the illicit manoeuvre concerning the land being litigated under this suit which had been alienated to the successful applicant, the late Hj Taib B Abu Bakar, are tainted with

elements of illegality by the 1st and 2nd Defendants, conducted with the sole intention to deceive; and to unlawfully reap and retain unjustly enrich and benefitted for themselves.

[49] It was appropriate for the court to take judicial notice that the witness statement of PW7 was in fact filed by the plaintiff himself (see encl 202). This and coupled with PW7's evidence that he had not prepared the said witness statement and without more, little weight could be attached to PW7's assertion that the plaintiff had purchased the land from Hj Taib.

[50] To recapitulate, prayer 39.1(a) of the plaintiff's claim was for a declaration that there was a contract enforceable in law and capable of specific performance made between the plaintiff and Hj Taib.

[51] It was an express term in the letter of offer issued to Hj Taib that the land was prohibited from being transferred to another without the permission from the Director of Lands and Surveys Department. A similar term was found on the title deed to the land.

[52] The seventh defendant (DW13) who was once the Director of Lands and Surveys Department testified as to why permission to transfer by the Director was required as follows (Q/A 8, DWS-13):

A: As I said earlier that the said land is under the smallholder's scheme which is for the landless. This means that only one lots of land under smallholder scheme is given for an applicant.

Initially, sublease/transfer of the said land under the smallholder scheme is prohibited unless by way of inheritance. This condition was put in order to for the applicant of a smallholders scheme to own a piece of land and not to remain landless so further increase their economic value. Afterwards, this condition was amended by deleting 'unless by way of inheritance' to with unless with permission by the Director of Lands & Surveys Department which means that sublease and transfer can only be allowed with permission of the Director of Lands & Surveys Department.

This condition are imposed by the Director of Lands & Surveys Department to ensure that the land remain with the landless that is one lot per applicant and so that the applicant would not again after receiving title and selling the said land, apply for another land under the smallholder scheme which is an abuse to defeat the intention of the smallholder scheme which is for the landless

[53] It was not in dispute that there was no permission obtained by Hj Taib to transfer the land to the plaintiff. Thus, the question which arose was, even if there was such an agreement between the plaintiff and Hj Taib, was it capable of specific performance against the Director of Lands and Surveys so that the land must be transferred from Hj Taib to the plaintiff?

[54] It is provided under s 9(1) of the Land Ordinance (Sabah) (Cap 68) that:

> Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions in respect thereof to be set out in the title.

[55] In *Workon Sdn Bhd v The Director of Lands and Surveys, Sabah & Ors* [1999] 4 MLJ 177; [1999] 1 LNS 40 the issue was whether the Director's discretion under s 9 of the Land Ordinance (Sabah) (Cap 68) was subject to judicial review to compel the Director to issue the document of title. Richard Malanjum J (as he then was) answered the question in the negative and held as follows:

> Meanwhile, I have noted the view expressed by the learned counsel for the applicant on the interpretation of s 9 of the Ordinance as a possible answer to the preceding point. However, to agree with him would tantamount to saying that once a letter of offer is issued there is no reversal and that a successful applicant is in good a position as a registered owner. That I think is not the intention of the Ordinance. Section 88 is clear on that. At best therefore such applicant, as the applicant in this case, may only have a valid contract with the respondent. And that seems to be the view as well of learned counsel for the applicant when he submitted that: 'the state government in effect will be a party to a legally binding agreement'. Thus, there is an alternative remedy in such a situation, namely for the applicant to go for a civil action for breach of contract if at the end of the day the acceptance of the letter of offer comes to nothing. Such a course of action would, I think, be more convenient, beneficial and effective in view of the discretionary nature of s 9 of the Ordinance.

[56] Similarly, in the present case, the prayer for declaration for the alleged agreement between the plaintiff and Hj Taib to be specifically performed was bound to come to naught as it necessarily amounted to compelling the Director to exercise his discretion under s 9(1) of the Land Ordinance (Sabah) (Cap 68) in favour of the plaintiff. This prayer clearly went against s 44 of the Specific Relief Act 1950 which provides that:

> (2) Nothing in this section shall be deemed to authorise a Judge:
>
> (c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[57] On the totality of the evidence before this court, I concluded that the plaintiff had failed to establish that there was a sale and purchase agreement between him and Hj Taib. Even if there was such an agreement, it would not have been capable of specific performance as it would go against the Director's discretion under s 9 of the Land Ordinance (Sabah) (Cap 68). The first issue was therefore answered in the negative.

[58] As noted above, the rest of the issues for this court's determination hinged on an affirmative finding on the first issue. As the first issue had been answered in the negative, it followed that the rest of the issues need not be considered.

[59] However, for the sake of argument, even if the rest of the issues were considered, the plaintiff's claim would still fail for the following reasons.

Claim against the first, second and third defendants not made out

[60] While not spelt out, the plaintiff's cause of action against the first and second defendants was premised on the tort of interference with contractual rights, in this case, the alleged sale and purchase agreement between the plaintiff and Hj Taib over the land.

[61] Notwithstanding these allegations, learned counsel for the plaintiff did not dwell on this allegation in his brief written submission save for merely contended that the first defendant (DW4) knew the plaintiff and that the land belonged to the plaintiff but that the first defendant instead arranged for the land to be inspected by the ninth defendant's officers together with the Agriculture Department with a view to prepare a report that the land had been developed. It was further contended that the first defendant had then assisted the eighth and ninth defendants to prepare and register the draft title and subsequently contacted the second defendant to offer the land for sale.

[62] Learned counsel for the plaintiff did not address the court on the applicable principles of law as laid down by the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; [1984] 2 CLJ 88; [1984] 1 CLJ Rep 211 on the following conditions to be satisfied for such a claim:

(a) there must be direct or indirect interference, coupled with the use of unlawful means;

(b) the defendant must be shown to have knowledge of the relevant contract;

(c) the defendant must be shown to have the intent to interfere;

(d) the plaintiff must show that he has suffered special damages, that is, more than nominal damages; and

(e) so far as it is necessary, the plaintiff must successfully rebut any defence on justification which the defendant may put forward.

[63] Based on the above authority, it was incumbent upon the plaintiff to lead evidence to show that the first, second and/or third defendants had

deliberately and knowingly committed an overt act to interfere with the alleged sale and purchase agreement entered between the plaintiff and Hj Taib. However, that was neither dealt with in evidence nor in submissions. Neither did the plaintiff establish that the first, second and/or third defendants had, by unlawful means, whether directly or indirectly, procure the alleged interference.

[64] The plaintiff also alleged that the first and second defendants conspired with the sixth to the ninth defendants to inflict injury on him with common intention to cause him to suffer loss and damages.

[65] It is trite that to establish such cause of action, the plaintiff has to prove the following elements:

(a) that there exists an agreement between two or more persons;

(b) that the agreement is for the purpose of injuring the plaintiff;

(c) that acts done in execution of that agreement resulted in the damage to the plaintiff; and

(d) that damage is an essential element and where damage is not pleaded the statement of claim may be struck out.

(See *Renault SA v Inokom Corporation Sdn Bhd & Anor and other applications* [2010] 5 MLJ 394; [2010] 5 CLJ 32; and *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ Rep 243).

[66] In *Renault SA*, the Court of Appeal stated that the agreement to injure must come first (in other words, the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.

[67] In the present case, it was merely contended for the plaintiff that by refusing to prepare the draft title and to give permission to the plaintiff to have the land transferred into his name, the sixth and seventh defendants had deprived the plaintiff of his 'constitutional right and legitimate expectation to have the title to the land to be registered into his or his wife's name'.

[68] It was further contended that the eighth and ninth defendants assisted the first defendant to obtain the draft title, in registering the title and granting permission to transfer the land to Masunah and the sublease of the land to the second defendant's son despite the eighth defendant having known of the plaintiff's alleged interest in the land as early as 1993.

[69] The evidence showed that the ninth defendant had granted Hj Taib the permission to transfer the land by a letter dated 12 October 2011 (see p 6,

Bundle F). Thus, if at all, the plaintiff had to show evidence that there was an agreement between the defendants to injure the plaintiff before the permission was granted. However, there was no such evidence led. Neither was it suggested in the cross-examination of the defendants' witnesses that there was such an agreement.

[70] There was therefore nothing before the court to support the plaintiff's allegation that the defendants had conspired between themselves to deprive him of the land.

[71] The plaintiff had also alleged that the purchaser of the land was in fact the second defendant and not Masunah, in contravention of s 17 of the Land Ordinance (Sabah) (Cap 68) which prohibits dealings on native titled lands between natives and non-natives. The plaintiff thus prayed for the transfer of the land from Hj Taib to Masunah to be revoked and set aside on the ground of illegality.

[72] As earlier stated, as at the trial of this action, the land was still registered in Masunah's name. In his witness statement, DW9 testified that the transfer was cancelled by virtue of the judgment in default but that the cancellation order could not be registered as the owner copy of the title deed was not presented together with the order (Q/A 11, DWS-9).

[73] It was not in dispute that Masunah was a native and thus was entitled to hold the land in her name. Masunah had then subleased the land to her nephew who is also the second defendant's son (DW6) for 30 years upon obtaining the permission of the ninth defendant (Q/A 11 and 12, DWS-6). Sublease of a native land is permissible under s 17(5) of the Land Ordinance (Sabah) (Cap 68).

[74] The only issue was whether the plaintiff had, on a balance of probabilities, established his allegation that the land was in fact purchased by the second defendant from Hj Taib and registered under Masunah's name as the second defendant's nominee in circumvention of s 17(1) of the Land Ordinance (Sabah) (Cap 68).

[75] Case law where the courts have struck down dealings in circumvention of s 17(1) of the Land Ordinance (Sabah) (Cap 68) showed that the nominee in those cases had purportedly executed trust deeds and granted powers of attorney in favour of the actual non-native purchaser.

[76] In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180; [2017] 9 CLJ 401, for instance, apart from executing a trust deed in favour of the fourth defendant company, the native nominee had also

granted a power of attorney giving absolute power to the said company to sell, dispose of, charge or in any way deal with the native titled land.

[77] There was no allegation and/or evidence of a trust deed or power of attorney executed by Masunah in favour of the second defendant in the present case.

[78] Where there was no trust deed or power of attorney executed, there was evidence led for the court to make a finding that the native was merely a nominee. In the case of *Norsitah Ottoh v Nasry Yahya & Ors* [2010] MLJU 2207, for instance, Clement Skinner J (as he then was) made such finding after taking into account the following:

> Fifthly, the following evidence clearly point to the plaintiff acting as a mere nominee of Kawagoe:
>
> (a) the plaintiff says that she became a Director and shareholder of Ramai Aktif in 1997. Before becoming a Director, she worked in the company. Her job was checking the letters and her monthly salary was RM500. She said she became a Director after discussions with Kawagoe but her salary remained at RM500 per month. She said she owned 175,000 shares of RM1 each in Ramai Aktif which are fully paid up but when cross-examined as to where she got the money to pay for her shares, she admitted it came from the company and that Kawagoe had prepared the money;
>
> (b) the plaintiff who claims to be a 'native' is the largest shareholder in Ramai Aktif a company involved in the oil palm and sawn timber business, holding 175,000 shares but which she never paid for with her own money and which she was not capable of paying for on her own resources of RM500 a month salary;
>
> (c) the next biggest shareholder in the company in Kawagoe holding 125,000 shares followed by Rose Lee holding 50,000 shares; Rose Lee was a mere paid clerk before she was invited to become a director and shareholder by Kawagoe;
>
> (d) the person who stands to benefit most from the company apart from the plaintiff is Kawagoe, but it was really Kawagoe who was the controlling mind in the company;
>
> (e) although the plaintiff says she bought the seven parcels of land for herself, it is in evidence that all the negotiations both before and after the purchase of the said lands was conducted by Kawagoe. Further, after she commenced this suit, the second, third, fourth and sixth defendants all delivered their title deeds to her. Instead of registering the lands in her name, the lands were transferred and registered in the name of the other persons mentioned earlier. When asked in cross-examination why she allowed that to happen, the plaintiff said it was 'for the best of the Company'. I do not believe the plaintiff's answer. It is unbelievable that a

person who has borrowed so much money to buy the lands and which she has already leased to the Company for 30 years would agree for the said lands to be registered in someone else's names and then leased back by those new owners to the company, in which she only receives RM500 salary a month and no director's fees or profits or dividends or any other form of benefit, and to which company she still owes the RM317,000 which she borrowed from it; and

(f) the plaintiff openly admits that she was educated till Primary 6, is an ordinary housewife married to a fisherman with no experience or expertise in the oil palm or timber business before she started working in Ramai Aktif and then became a Director and shareholder thereof. The plaintiff also admitted that she had never met the fifth and seventh defendant before the commencement of this trial and that all the negotiations with the first defendant to buy the said lands was done by Kawagoe. He also directed how the lands belonging to the other defendants were to be dealt with. The second defendant Azman bin Nasry and the sixth defendant Rahimah bt Nasry came to give evidence on behalf of the plaintiff as PW2 and PW1 respectively. They both testified that they transferred their lands on the direction of Kawagoe to Lee bin Duangsa and Rodey bin Saini and not to the plaintiff. This evidence shows that it was really Kawagoe who was dealing with their said lands even though the plaintiff had purchased it.

[79] It was merely submitted for the plaintiff that the RM50,000 which was used to purchase the land was from the second defendant and that if it was Masunah who was the bona fide purchaser of the land, the money must be hers and not from her relatives. No authorities were cited in support of the plaintiff's contention.

[80] The evidence showed that Masunah was the second defendant's sister-in-law. However, it was never suggested in cross-examination of the second defendant (DW7) that he was the actual purchaser of the land contrary to the rule in *Browne v Dunn* [1893] 6 R 67.

[81] In any event, even if it was true that the money used to purchase the land did come from the second defendant, that by itself and without more was insufficient evidence to establish that therefore Masunah must have been the nominee of the second defendant.

[82] This court therefore concluded that the plaintiff failed to prove on a balance of probabilities his claim against the first, second and third defendants.

Claim against the sixth to the ninth defendants not made out

[83] The plaintiff had alleged that the sixth and seventh defendants had

abused their power (issue 4a), that the sixth and seventh defendants had colluded and conspired with the first and second defendants (issue 4b), that the seventh and eighth defendant had been negligent in the grant of the permission to transfer the land from the third to the fourth defendant (issue 5) and to transfer and sublease from the fourth defendant to the second defendant (issue 6).

[84] Issues 4b and 6 have been dealt with in paras [64]–[70] above.

[85] As for the allegations that the sixth and seventh defendants had abused their power, it was contended for the plaintiff that they had done so by refusing to entertain the plaintiff's application for issuance of land titles and permission to transfer several parcels of land in Luang Manis scheme including the land.

[86] To this allegation, learned State counsel submitted that the letter of offer for the land was issued to Hj Taib and that it was for Hj Taib to comply with the terms and conditions of the offer including to first obtain the permission to transfer the land to the plaintiff. Learned state counsel further contended that the plaintiff had no authority to demand vide his letter dated 14 April 2000 for the ninth defendant to issue the land title and/or for the ninth defendant not to issue the land title without his consent.

[87] I found merit in the submissions. For one, the plaintiff was not the applicant of the land. The letter of offer was not issued to his name and there was also no permission sought by Hj Taib to transfer the land to the plaintiff. When the ninth defendant issued the land title to Hj Taib, it was all within his power under s 9(1) of the Land Ordinance (Sabah) (Cap 68) (also see *Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah* [1994] MLJU 398; [1994] 3 CLJ 229). It was a fallacy for the plaintiff to insist that his consent was sought before the ninth defendant exercised such power.

[88] Similarly, the plaintiff's contention that the sixth and seventh defendants had deprived the plaintiff of his 'constitutional right and legitimate expectation to have the title to the land to be registered into his or his wife's name' was misconceived. Although s 9 of the Land Ordinance (Sabah) (Cap 68) was not specifically considered by the Court of Appeal in the case of *The State Government Of Sabah & Ors v Clarence Chiuh Ken Loong & Ors* [2017] 3 MLJ 127; [2017] 2 CLJ 379, the court also dealt with the issue of whether the plaintiffs therein had legitimate expectation to be issued with title deeds for the subject lands pursuant to the letters of offer issued to them. The plaintiffs had also paid 50% of the premium payable for the lands. Despite that, the Lands and Surveys Department subsequently informed the plaintiffs that the registered survey plans for their land applications could not be issued because the lands were within the forest reserve of Madai Baturong.

[89] The Court of Appeal allowed the appeal, inter alia, holding as follows: A

> [24] Having said that, we agree with the submissions of the learned state counsel that there is no basis to apply the law of contract on the facts of the present appeal. The alienation of state land is regulated by the Sabah Land Ordinance which lays out clear provisions on the process of alienation of land in the state of Sabah.
>
> [25] *It is plain and clear that s 12 of the Sabah Land Ordinance and r 2 of the Sabah Land Rules do not recognise mere application for land and any payment made pursuant thereto as an undertaking that, the application for land has been approved … And under s 88, it is clearly provided that any interest in land shall be valid only upon registration of title …* B
>
> [26] The learned JC had erred to have ruled that the plaintiffs had legitimate expectation purely on the two offer letters to alienate lands to the plaintiffs which state clearly that the offer was conditional upon availability of unencumbered state lands upon survey. *The doctrine of legitimate expectation does not apply and cannot override the legal provision as clearly stipulated under the Sabah Land Ordinance* … (Emphasis added.) C D

[90] There was no submission by learned counsel for the plaintiff on whether there was negligence on the part of the seventh and eighth defendants save for to contend that the seventh and eighth defendants were fully aware of the plaintiff and his wife's interest in the land and their occupation of the land as early as 1993 and therefore should have inspected it before granting the permission to transfer the land from Hj Taib to Masunah. Neither was there reference to any case law to support the plaintiff's contention on this issue. This issue was therefore a non-starter. E F

[91] Taking all of the above into account, this court held that the plaintiff failed to establish his claim against the sixth to the ninth defendants.

CONCLUSION G

[92] The plaintiff failed to establish that he had a valid sale and purchase agreement with Hj Taib over the land. The agreement, would not have been capable of specific performance as it would offend s 9(1) of the Land Ordinance (Sabah) (Cap 68). H

[93] The plaintiff also failed to establish his claim against the first and second and sixth to the ninth defendants on a balance of probabilities.

[94] In the premises, the plaintiff's claim was dismissed with costs subject to allocatur. I

Consequential order

[95] Having considered the plaintiff's claim on its merits after a full trial, this court was faced with the fact that there still existed the judgments in default against the third, fourth and fifth defendants.

[96] The grant of prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v) and costs against the fourth and fifth defendants and of prayers 39.1(a) and (c) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) against the third defendants under the judgments in default was clearly inconsistent with this court's dismissal of the whole of the plaintiff's claim.

[97] The question for the court was, could the judgments in default be sustained in the circumstances of this case, and if not, could the court set them aside on its own motion?

[98] It was held in *SA Andavan v Registrar Of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220; [1975] 1 LNS 155 as follows:

> Generally speaking it is for an interested party who is affected by a default judgment to apply to have it set aside but if during the hearing of any cause or matter it comes to the notice of the court that there has been a serious procedural irregularity in the obtaining of a judgment which in some way adversely affects the rights of any of the parties before it the court may set it aside on its own motion.

[99] As noted earlier, the reliefs under the judgments in default were declaratory in nature and were therefore liable to be set aside. Given this court's finding on the plaintiff's claim on its merits, it followed that the judgments in default were no longer sustainable. The court therefore on its own motion set aside the judgments in default (encls 56 and 91).

Plaintiff's claim dismissed with costs.

Reported by Mohd Kamarul Anwar